Holland Knight

Tel 202 955 3000 Fax 202 955 5564 Holland & Knight LLP 2099 Pennsylvania Avenue, N.W., Suite 100 Washington, D.C. 20006 www.hklaw.com

Marvin Rosenberg 202 457 7147 marvin.rosenberg@hklaw.com

November 2, 3004

ELECTRONICALLY FILED

Ms. Marlene Dortch Secretary Federal Communications Commission 445 12th Street, SW Washington, DC 20554

Re: EX-PARTE COMMUNICATION MB Docket No. 03-206

Dear Ms. Dortch:

Transmitted herewith on behalf of Dominion Video Satellite, Inc. ("Dominion") is the Judgment of the Honorable John L. Kane, Senior Judge, United States District Court for the District of Colorado, confirming the Final Arbitration Award issued by the American Arbitration Association. The Final Arbitration Award was filed with the Commission on September 22, 2004. Also, enclosed is the transcript of the oral argument preceding Judge Kane's issuance of the Judgment.

Very truly yours,

Marvin Rosenberg

cc: Eloise Gore, Media Bureau Rosalee Chiara, Media Bureau Kenneth M. Scheible, Jr., Enforcement Bureau Robert L. Olender, Esq. Pantelis Michalopoulos, Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 03-K-607

DOMINION VIDEO SATELLITE, INC.,

Plaintiff,

OCT 2 2 2004

GREGORY C. LANGH

٧.

ECHOSTAR SATELLITE L.L.C., f/k/a ECHOSTAR SATELLITE CORPORATION,

Defendant.

JUDGMENT

This matter was before the Court on October 20, 2004 for hearing on Parties' Motions to Confirm or Vacate Final Arbitration Award. The Court, after hearing the arguments and statements of counsel, made oral findings of facts and conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that Plaintiff's Motion to Confirm Final Arbitration Award is granted. It is FURTHER ORDERED that judgment shall enter in favor of plaintiff Dominion Video Satellite, Inc. and against Echostar Satellite Corporation. It is

FURTHER ORDERED that post judgment interest shall accrue at the rate of 8% from the date of the arbitration award. It is

FURTHER ORDERED that plaintiff Dominion Video Satellite, Inc. is awarded attorney fees and costs. It is

FURTHER ORDERED that plaintiff Dominion Video Satellite, Inc. shall have its costs by filing a Bill of Costs within ten days of the entry of judgment.

Dated at Denver, Colorado, this day of October 2004.

UNITED STATES DISTRICT COURT DENVER, COLORADO

FOR THE COURT

OCT 222004

Gregory C. Langham, Clerk

GREGORY C. LANGHAM

Stephen P. Ehrlich, Chief Deputy Clerk

CERTIFICATE OF SERVICE

Civil Action No. 03-K-607

The undersigned certifies that a copy of the foregoing was served on October 22, 2004, by:

() delivery to:

OR

(x) depositing the same in the United States Mail, postage prepaid, addressed to:

Mark D. Colley 2099 Pennsylvania Ave. N.W. Suite 100 Washington, D.C. 20006-6801

Thomas D. Leland 1430 Wynkoop Street Suite 300 Denver, CO 80202

Ross W. Wooten Seventh Floor 2401 Fountainview, Suite 700 Houston, TX 77057

Thomas Edward Downey, Jr. 733 East 8th Ave. Denver, CO 80203

Todd A. Jansen 1700 Broadway #1516 Denver, CO 80290

GREG LANGHAM, Clerk

Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 03-K-607

DOMINION VIDEO SATELLITE, INC.,

Plaintiff,

٧.

ECHOSTAR SATELLITE LLC, f/k/a ECHOSTAR SATELLITE CORP., Defendant.

REPORTER'S TRANSCRIPT (Motions Hearing)

Proceedings before the HONORABLE JOHN L. KANE, Senior Judge, United States District Court, for the District of Colorado, commencing at 10:10 a.m. on the 20th day of October, 2004, Alfred A. Arraj United States Courthouse, Denver, Colorado.

APPEARANCES

FOR THE PLAINTIFF: MARK D. COLLEY, Holland & Knight, LLP, 2099 Pennsylvania Ave., N.W., Suite 100, Washington, DC 20006

THOMAS D. LELAND, Hale Friesen, LLP, 1430 Wynkoop Street, Suite 300, Denver, CO 80202

FOR THE DEFENDANT:
ROSS W. WOOTEN, T. Wade Welch & Associates, 2401
Fountainview, Suite 800, Houston, TX 77057

DARLENE M. MARTINEZ, RMR, CRR United States District Court For the District of Colorado

03k607(Motns)1.TXT OCTOBER 20, 2004

1	OCTOBER 20, 2004
2	THE COURT: This is 03-K-607, Dominion Video
3	Satellite v. Echostar Satellite Corporation. The cause
4	comes on for hearing on a motion to confirm or vacate
5	final arbitration awards. Counsel should be advised that
6	I have read the briefs, the moving papers and have
7	reviewed the previous decisions from this Court and the
8	Court of Appeals. Are you ready to proceed?
9	MR. COLLEY: Yes, Your Honor.
10	THE COURT: Ready to proceed?
11	MR. WOOTEN: Yes, Your Honor.
12	THE COURT: Go ahead.
13	MR. COLLEY: Your Honor, I take your advice to
14	heart, that you reviewed these papers, and I may not need
15	to speak very long, given your pleasure. There is not a
16	lot I have to add in terms of substance of our arguments.
17	If I can take just a moment, I think it's important to
18	note that we've taken a long time to get here, and we are
19	trying to finally get enforcement of what we think are
20	very flagrant contract breaches.
21	We have unanimous decisions from the arbitration
22	panel that conducted multiple hearings and plenty of
23	briefings, received extensive evidence form parties on
24	both sides, and got all the discovery they asked for. And
25	we're now presented with the opportunity to finally have
	DARLENE M. MARTINEZ, RMR, CRR United States District_Court

For the District of Colorado

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- 1 this entered as the judgment so that the orders of that
- 2 panel can be enforced.
- The entry of that order -- those orders as a Page 2 3

- 4 judgment by this Court, as you know, is subject to a very
- 5 high standard of review, and I think it is important to
- 6 recognize that the kinds of things that courts look to to
- 7 historically not enter arbitration orders aren't before
- 8 us. We don't have allegations of corruption, fraud, undue
- 9 means. We don't have any allegations of partiality or
- 10 misconduct. There was no postponement that was rejected.
- 11 In fact, the one that was requested by Echostar was
- 12 accepted. There is no evidence precluded during the
- 13 hearing. There was no prejudicial misbehavior.
- 14 The one argument that has been made suggesting that
- 15 there was a manifest disregard or an action by the panel
- 16 ignoring a provision of the contract, ws actually belied
- 17 by the record, which shows that the panel did not ignore
- 18 the contract provisions as relates to the award of damages
- 19 but, in fact, interpreted the contract.
- 20 Echostar's contention that they disagree or
- 21 continue to disagree with that interpretation is not the
- 22 kind of manifest disregard that justifies a district court
- 23 not entering an order. The panel has to look at a
- 24 contract language provision that's plain on its face and
- 25 agree that they are going to disregard it and act to the

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United States District Court
For the District of Colorado

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1 contrary.

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- There are multiple filings and challenges here. By
- 3 my count there are nine different challenges to four
- 4 different issues. I will not belabor and go through them.
- 5 I have my notes here organized by issue and subset and,

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- 6 frankly, given your admonition, I am inclined just to blow
- 7 past that and indicate that in our view, the briefings
- 8 that you've received, I think make clear that there aren't
- 9 any challenges to these awards that have even a shred of
- 10 merit to them. There is no evidentiary foundation. There
- 11 is no legal foundation. There is no rational foundation.
- The opposition to having these judgments entered,
- 13 in fact, has gone so far as to bring back before this
- 14 Court the very same arguments that were rejected
- 15 previously by Your Honor, and to even go so far as to try
- 16 to rest on an argument that is 180 degrees from the
- 17 position that was taken both in this court and in the
- 18 Court of Appeals with regard to whether or not damages can
- 19 be recovered.
- 20 We asked for fees in this case, Your Honor. It is
- 21 an extraordinary umbrage, I think, for this opposition to
- 22 be filed in this manner and take these kinds of positions
- 23 today. We anticipate that shortly after this hearing, and
- 24 with the presumption that these orders will be entered,
- 25 that there will be a motion to stay brought on similar

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1 grounds.

We would urge the Court to reject that summarily.

3 We would also ask, in addition to the fees, that whatever

- 4 order this Court does enter, in terms of making these
- 5 arbitration decisions an order of this Court, that the
- 6 Court include a provision in the order for post-judgment
- 7 interest running from the date of the arbitration award at
- 8 the statutory rate of 8 percent. That is not a matter of Page 4

- 9' briefing, it is just a matter of statutory right that we
- 10 have. But we would like to see it in the order so that we
- 11 don't have a contest over that in the clerk's office about
- 12 having that added later.
- 13 Your Honor, with that, unless you have any
- 14 questions on any of the specific issues that you would
- 15 like to discuss at greater length, I will leave it there.
- 16 THE COURT: Thank you very much.
- 17 MR. WOOTEN: Do you need a moment. Your Honor?
- 18 THE COURT: No, I don't, go ahead.
- 19 MR. WOOTEN: Thank you, Your Honor. May it please
- 20 the Court. Likewise, Your Honor, I am not going to go
- 21 through the arguments in our briefs, I think they are all
- 22 there. I do want to address a couple little things
- 23 Mr. Colley said, especially with regard to Echostar's
- 24 opposition on our motion to vacate the arbitration award
- 25 is somehow frivolous because we are repeating arguments.

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- 1 There are a couple of issues there.
- Number one, I want the Court to understand why we
- 3 filed a separate motion to vacate. They filed a motion to
- 4 confirm the partial final award. We opposed it, and we
- 5 included arguments in there to why we believed the
- 6 arbitration award should be vacated. Dominion came back
- 7 and objected and said, no, Echostar, you can't do that,
- 8 you have to file a separate motion to vacate. So that is
- 9 all we did. We put all our of our arguments in one simple
- 10 brief, and called it a motion to vacate, just to handle

- 11 that procedural issue, not to delay matters.
- 12 Second, he says that we somehow should be
- 13 sanctioned or pay fees because we are repeating arguments
- 14 that have already been rejected by this Court. That is
- 15 true, but it is not sanctionable to refuse to waive your
- 16 arguments. We did make certain arguments to this Court.
- 17 THE COURT: It is sanctionable to persist after
- 18 there have been court rulings. It unnecessarily takes up
- 19 the Court's time and, excuse me, I apologize for
- 20 interrupting.
- 21 MR. WOOTEN: I'm sorry.
- 22 THE COURT: And candor requires that counsel state
- 23 what the rulings are that the Court has ruled that are
- 24 adverse to them, and continue. There is no rehearing of
- 25 it or regurgitation of it that is permitted. That is one

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- 1 of the reasons why our courts are so crowded. People
- don't understand what "no" means. 2
- 3 MR. WOOTEN: I understand that, Your Honor. But as
- 4 you recall, we made certain arguments here. I understand
- Your Honor made rulings. We did appeal them. There was 5
- an oral argument in front of the Tenth Circuit Court of 6
- Appeals that primarily addressed preemption of First 7
- 8 Amendment, but then when the Tenth Circuit ruled, they
- 9 didn't address those.
- 10 We are not trying to come here and re-persuade Your
- 11 Honor, we are simply trying to preserve our argument in
- case we go back there. We are not trying to re-litigate. 12
- 13 we didn't file a bunch of papers. We kept them as short Page 6

- 14 as possible. But we just felt that unless we put them in
- 15 there, that Dominion later would be able say, Echostar,
- 16 you now waived that argument, you can't ever bring it up
- 17 again. We are just simply trying to preserve the
- 18 arguments that we've always had in this case, not to try
- 19 to burden this Court with additional paperwork or
- 20 additional work.
- 21 THE COURT: Well, there is a way of doing that that
- you didn't do, and that is simply to say we preserve these
- 23 arguments then get on with it.
- 24 MR. WOOTEN: I apologize, Your Honor. If I had
- 25 known that would have take care of it, that is exactly

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- 1 what we would have done, because that is our only intent.
- 2 And I want to just bring up something about Mr.
- 3 Colley says there is going to be a motion to stay, and
- 4 that Echostar is trying to delay enforcement. Echostar
- 5 actually has already taken down two of these channels.
- 6 There is only one more channel that hasn't come down. And
- 7 that presents a more technical issue, because as Your
- 8 Honor may recall from the preliminary injunction hearing,
- 9 there are certain must-carry rights that are sort of
- 10 different from the public interest obligations.
- 11 A company like Day Star, they have channels around
- 12 the country, and have an ability to insist on the
- 13 must-carry right. Echostar is transitioning this national
- 14 signal of Day Star, because Day Star is insisting on the
- 15 must-carry rights. They are simply transitioning that

- 16 signal to get to these local markets for must-carry, which
- 17 I expect to be done at the end of the week. There is not
- 18 going to be a motion to stay.
- 19 And then the other argument with regard to the --
- 20 Dominion complains quite a bit because we make an argument
- 21 about a certain provision of the agreement. Our argument
- 22 there is simply a plain reading of the agreement.
- 23 Dominion says we should have presented to Your Honor all
- 24 this evidence from the arbitration. Well, Dominion is the
- one that wants to go parol and say all this other evidence

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- 1 beyond the language of the agreement is, you know, is
- 2 applicable here.
- 3 Our simple argument, and again we tried to keep it
- 4 as short as possible, is that there is a provision in this
- 5 contract. We did present this to the arbitration panel.
- 6 They did rule against us. You know, we are simply trying
- 7 to exercise our right because we feel the ruling was
- 8 incorrect. And beyond that, Your Honor, unless Your Honor
- 9 has any questions, I don't have anything further.
- 10 THE COURT: I don't have any questions.
- 11 Anything else?
- 12 MR. COLLEY: I'm delighted to hear there won't be a
- 13 motion to stay, Your Honor. I would only note that this
- 14 plain-meaning-of-the-contract argument that Mr. Wooten
- 15 just alluded to relates to the clause in the contract in
- 16 which they relied. It says we can't recover damages. The
- 17 plain meaning argument of the contract is 180 degrees
- 18 reverse of the plain meaning of the contract that they
 Page 8

- 19 brought here in this Court, arguing that the reason that
- 20 they couldn't get an injunction is because we could
- 21 recover damages. So that's the kind of argument that I
- 22 have a problem with. And I'll leave it there.
- 23 THE COURT: Well, I think that the res judicata
- 24 argument was not an issue, is a non-issue, and one I
- 25 already dismissed in the memorandum opinion granting

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- 1 Dominion's motion for preliminary injunction. As the
- 2 first arbitration panel was convened on the equipment
- subsidy antitrust issues, and any mention of Section 3
- 8.4(d) was only in passing. The justiciability argument 4
- is similarly unpersuasive, largely because Echostar never 5
- raised it until after losing on the merits. 6
- 7 And, frankly, and I want the record to reflect
- this. I assume that you are going to appeal, and I hope 8
- 9 you do. Because it's annoying to me to have all these
- 10 inconsistent arguments. It's annoying to me to watch
- 11 people change horses in the middle of the stream. And
- 12 it's more than annoying. It's indicative of a disregard
- 13 for the judicial process. And that is characteristic of
- 14 this litigation; the changing of positions constantly.
- And, frankly, what it means is that with regard to 15
- 16 trying to rely upon a party in order to analyze a
- 17 situation, I simply can't rely, that's all. That is what
- 18 I am stuck with. Well, it's probably intemperate of me to
- get wind of that, but I have. 19
- 20 The second set of general grounds of Echostar fall

- 21 within the more tradition complaint category of the
- 22 arbitration panel exceeding its authority in ruling
- 23 against Echostar. And here the arguments are that the
- 24 federal law preempts private party's ability privately to
- 25 regulate or allocate rights to broadcast public interest

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- 1 programming. That Echostar was excused from its
- 2 obligations under the exclusivity provisions by FCA
- 3 Section 335 requiring it to broadcast public interest
- 4 programming, and that the panel over reached by awarding
- 5 Dominion an amount of damages under the agreement, and
- 6 that the final award violates the First Amendment of the
- 7 United States Constitution.
- 8 None of these arguments are persuasive. I
- 9 addressed the preemption and FCA public interest
- 10 requirements in my Memorandum Opinion and Order rejecting
- 11 Echostar's arguments, and that was at 27 F.Supp.2d at 1214
- 12 to -15. I decline to make a final determination on either
- 13 regard, however, finding the parties expressly committed
- 14 in Section 16 of their agreement to arbitrate those
- 15 issues.
- The issues were submitted to arbitration, and the
- 17 arbitrator explicitly rejected Echostar's assertion that
- 18 their performance under the exclusivity provisions should
- 19 be excused, one, by FCC regulations relating to public
- 20 interest programming and, two, as a matter of legal
- 21 impossibility or, three, as being preempted by those laws
- 22 and regulations.
- The deference afforded arbitration awards under Page 10

- 24 Section 10 of the FAA does not permit Echostar a second
- 25 bite at the apple now that it's lost. Maximum deference

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- 1 is to be accorded the decision of the arbitrator's
- 2 challenge under Section 10 of the Federal Arbitration Act.
- 3 That is the law of the Tenth Circuit, and as far as I
- 4 know, that is the law of the circuit. The standard of
- 5 review is amongst the narrowest known to the law. So said
- 6 the Tenth Circuit in Litvak Packing Company v. United Food
- 7 and Commercial Workers at 886 F.2d 275.
- 8 Only an arbitrator's manifest disregard of the law
- 9 as opposed to his erroneous interpretation or applications
- 10 of it are subject to reversal under the act. So says the
- 11 Supreme Court in Wilko v. Swan at 346 U.S. 427. Manifest
- 12 disregard means willful inattentiveness to the governing
- 13 law. The arbitrator's conduct in rulings in this complex
- 14 manner do not even approach the standard provocateur under
- 15 the act. And it is the complex nature of the intersect
- 16 between federal communications law and private interests
- 17 that likely drove these parties to commit to having any
- 18 disputes that arose under their transresponder agreement
- 19 submitted to arbitration in the first place.
- 20 Based on the highly deferential standard review
- 21 afforded the arbitrator's conclusions under the act, I
- 22 would reject Echostar's contention in support of its
- 23 motion to vacate, and confirm the arbitrator's final
- 24 award. And, frankly, I agree with the final arbitrator's
- 25 award, even though I would have to give maximum deference

1	to it even if I did disagree with it, but I don't.							
2	The request for fees is granted. Dominion is							
3	entitled to their fees, and you may obtain them within the							
4	next 10 days by filing a motion or a statement of							
5	agreement. If there is a disagreement as to the amount of							
6	fees, I will appoint a special master and assess costs as							
7	the special master recommends on the attorneys fees issue.							
8	You are also entitled to judgment on this case. We'll be							
9	in recess.							
10	(The proceedings are concluded.)							
11	REPORTER'S CERTIFICATE							
12								
13	I, Darlene M. Martinez, Official Certified							
14	shorthand Reporter for the United States District Court,							
15	District of Colorado, do hereby certify that the foregoing							
16	is a true and accurate transcript of the proceedings had							
17	as taken stenographically by me at the time and place							
18	aforementioned.							
19								
20	Dated this day of, 2004.							
21								
22								
23								
24	Darlene M. Martinez							
25	RMR, CRR							
	DARLENE M. MARTINEZ, RMR, CRR United States District Court For the District of Colorado							